

**KENTUCKY PERSONNEL BOARD
MINUTES OF NOVEMBER 8, 2013**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on November 8, 2013, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
David B. Stevens, Member
David F. Hutcheson, Jr., Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Ramona Herndon, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

Board Personnel Absent:

Larry B. Gillis, Vice Chairman

2. **READING OF THE MINUTES OF REGULAR MEETING HELD OCTOBER 11, 2013**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Blevins moved to approve the minutes, as submitted. Dr. Stevens seconded and the motion carried 6-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek summarized the Court of Appeals opinion for the Board on *Terry Farmer v. Transportation Cabinet*, 2012-CA-001505. Both the Franklin Circuit Court's and the Board's decision was upheld. Terry Farmer, a Bridge Inspector, inspected and classified a culvert as a bridge on his mother's property. By tampering with the measurements of the culvert, it qualified for federal funds. The Transportation Cabinet dismissed Farmer charging him with violating Cabinet policies and procedures and KRS Chapter 11A, Executive Branch Code of Ethics. Farmer's attorney, Hon. Paul Fauri, argued that the Ethics Commission has exclusive jurisdiction over KRS Chapter 11A. Although the Franklin Circuit Court, and supported by the Court of Appeals, found the Personnel Board erred in citing KRS 11A.020 as a reason for Farmer's dismissal, the court affirmed Farmer did violate the Cabinet's policy and procedure GAP-810.

On another matter, Mr. Sipek stated that the Board's budget was submitted to the Budget Director. In addition, the Budget Director asked each agency to provide information on the impact of funding increased costs of employer retirement contributions, if fully funded. Chairman Sapp asked if OPM would pick up the shortfall of any costs or has it not been fully funded in the past. Mr. Sipek stated it had not been fully funded in the past, but to assume it is fully funded, the Board had to explain how these costs would be covered.

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. **PERSONNEL CABINET'S REPORT**

The Hon. Dinah Bevington came forward to present the Personnel Cabinet's report.

Ms. Bevington stated that the 2014 Kentucky Employees' Health Plan (KEHP) open enrollment is complete and did not need to be extended. Staff worked very hard to accomplish this endeavor successfully. Of the one hundred and seventy-five thousand (175,000) individuals enrolled, 85 percent elected the Living Well plans.

The audit of the 2012 performance evaluations is almost completed. The Cabinet will provide a detailed report at the next meeting. Commissioner Mary Elizabeth Harrod will be on-hand to answer any questions the Board might have. By that time, mandatory training will have been completed by all agencies and the Cabinet will report on that as well.

The Cabinet sent out a memo to all agencies requesting whether they had any changes to initial probationary periods and the responses will be discussed at the next Board meeting. Chairman Sapp asked if the Personnel Cabinet did a review of these requests prior to providing them to the Board. Ms. Bevington stated they did.

Mr. Blevins asked if the Cabinet will be providing a comparison of salary and performance of state employees to the private sector, if it is not a burden to the Cabinet. Ms. Bevington stated that it was possible and that the Cabinet was already compiling some of this information.

At the conclusion of the Personnel Cabinet's report, Chairman Sapp called the parties forward for oral argument.

5. **ORAL ARGUMENTS**

- A. Angela Stumbo Baldwin v. Cabinet for Health and Family Services
(~~Request by Appellant~~) **Moved to December meeting**
- B. Ricky Jacobs v. Department of Agriculture (2013-007)

Present for oral arguments were counsel for the Appellant, Hon. Whitney Lawson, and counsel for Appellee, the Hon. Dan Egbers. After presenting oral arguments, the parties answered questions from the Board.

6. **PETITIONED POSITIONS**

Special Assistant – Office of the Adjutant General
Department of Military Affairs

Present were Mr. Mike Jones, Acting Director, and Ms. Crystal Simpson, Personnel Administrator.

Mr. Jones said the Special Assistant position is a policy making position and is being requested under the provision of KRS 18A.115(h). This position will be responsible for oversight and development of a statewide comprehensive emergency program for the Division of Emergency Management. Mr. Sipek asked if this counted toward their allotment of principal assistants if one of the others is non-chapter 18A. Ms. Simpson said it did, as it is the third position. Mr. Jones added that the Special Assistant will actually fill the Director's position in the Adjutant General's office.

Mr. Hutcheson moved to approve the request for the Special Assistant position. Dr. Stevens seconded and the motion carried 6-0.

7. **REQUEST FOR OPINION MADE BY THE PERSONNEL CABINET**

Hon. Dinah Bevington was present to answer the Board's questions concerning the Cabinet's request for an opinion as to whether a merit employee can serve on the Board while detailed to a non-merit position.

Ms. Bevington stated that this position may perform duties that conflict with Board matters. The employee would maintain their merit status as a non-merit, but would not go through any performance evaluations.

Mr. Blevins asked whether taking this position is mandatory. Ms. Bevington stated it was not. Mr. Blevins stated that he read the statute [KRS 18A.050(6)]¹ to mean the employee shall resign immediately. Mr. Sipek stated that he thought it to mean that it was not mandatory for the employee to accept the detail and thus that statute would not apply, but if so it would allow agencies to “detail” a merit employee off of the Personnel Board. Mr. Blevins stated that perhaps the wording of the statute could be amended to add “except if detailed.” In response to Chairman Sapp’s question regarding whether the Governor signs off on this position, Ms. Bevington stated he would.

Chairman Sapp asked what kind of duties would conflict with serving on the Board. Ms. Bevington stated that this position will be privy to policy making decisions and implementing them, to which the Board has approval. Ms. Bevington stated that there are mechanisms at the Board which a member can recuse himself.

Mr. Hutcheson stated that if a merit employee accepts a non-merit position, that employee is technically non-merit.

Ms. Bevington stated there were approximately 48 merit employees last year who have been detailed to non-merit positions, with lengths of detail varying from a month to a year.

Mr. Sipek stated that a lot of the discussion today was not considered when he drafted his opinion and that there is no easy answer. He stated that if Ms. Bevington did not need an answer today, the matter could be deferred to allow for more time to find additional facts. Chairman Sapp stated that after hearing the discussion today, although no vote has been taken, it appears that if the employee accepted the non-merit position, he would not be allowed to serve on the Board. If deferred, Chairman Sapp stated that the Personnel Cabinet and the Personnel Board should have time to gather more information.

Mr. Blevins moved to defer this matter to the next Board meeting. Mr. Hutcheson seconded and the motion carried 6-0.

8. CLOSED SESSION

Mr. Hutcheson moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Dr. Stevens seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 6-0. (11:04 a.m.)

¹ (6) If an elected board member accepts an unclassified position with state government, his membership on the board shall be terminated immediately and the vacancy shall be filled as provided in KRS 18A.060.

Ms. Herndon moved to return to open session. Dr. Stevens seconded and the motion carried 6-0. (11:40 a.m.)

9. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

- A. Angela Stumbo Baldwin v. Cabinet for Health and Family Services (Demotion, involuntary transfer, lack of good behavior—appeal dismissed)
--Appellant's Exceptions and Request for Oral Argument
--Appellee's Response to Appellant's Exceptions
--Appellant's Motion to Reschedule Oral Argument – **Moved to December**

- B. Ricky Jacobs v. Department of Agriculture (2013-007)

Judge Chandler having considered Appellee's exceptions, Appellant's response and oral arguments moved to defer this matter to the next Board meeting. Mr. Hutcheson seconded and the motion carried 6-0.

- C. Richard Lyons v. Education and Workforce Development Cabinet (2013-021)

Mr. Blevins moved to accept the recommended order dismissing the appeal. Ms. Herndon seconded and the motion carried 6-0.

- D. Cheryl Gabbard v. Department of Veterans Affairs and Rita Gilbert (2012-035)

Dr. Stevens moved to accept the recommended order dismissing the appeal. Mr. Hutcheson seconded and the motion carried 6-0.

- E. Mark Schneider v. Cabinet for Health and Family Services (2013-050)

Mr. Blevins moved to accept the recommended order dismissing the appeal. Judge Chandler seconded and the motion carried 6-0.

Show Cause Orders - Appeals Dismissed – No Response Filed

The following cases had a show cause order entered by the hearing officer recommending that the appeals be dismissed for failure to timely prosecute unless a statement was filed by the Appellants stating sufficient cause to excuse their failure to appear at the scheduled hearing. There were no responses submitted by the Appellants to the show cause orders.

- F. Kenneth Chapman, Jr. v. Justice and Public Safety Cabinet (Juvenile Justice)
- G. Timothy Cunningham v. Justice and Public Safety Cabinet (Corrections)
- H. Terry Wilson v. Cabinet for Health and Family Services and Personnel Cabinet

Mr. Hutcheson moved to find that the Appellants had not responded to the show cause orders and that the recommended orders be accepted *en bloc* dismissing the appeals for failure to timely prosecute the appeals. Ms. Herndon seconded and the motion carried 6-0.

10. WITHDRAWALS

Dr. Stevens moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Mr. Blevins seconded and the motion carried 6-0.

- A. Kevin Brumley v. Personnel Cabinet
- B. Ruth Corbett v. Justice and Public Safety (Corrections)
- C. Gary Parnell v. Energy and Environment Cabinet
- D. Dennis Sharon v. Tourism, Arts and Heritage Cabinet (F&W)
- E. Brian Buckler v. Justice and Public Safety (DJJ)
- F. James Cunningham v. Justice and Public Safety (Corrections)

11. SETTLEMENTS

Mr. Hutcheson moved to accept the settlements *en bloc* as submitted by the parties, and to sustain the appeals to the extent set forth in the settlements. Dr. Stevens seconded and the motion carried 6-0.

- A. Dennis Keith Asher v. Dept. of Veterans Affairs
- B. Leslie Chad Hupp v. Finance and Administration Cabinet
- C. Vickie “Gale” Eden v. Finance and Administration Cabinet (mediated)

12. **OTHER**

Statutory change to KRS 18A.0551, Personnel Board Elections -- Procedures.

Mr. Crocker advised that it would save the Board approximately \$18,000 to eliminate the requirement of paper ballots. Participation in the 2006 Personnel Board election was about 9 percent and in 2010 was slightly over 7 percent, even though amendments to the statute made it easier to cast a ballot (i.e. hand-delivered, first-class mail, facsimile, or scanned e-mail).

Mr. Blevins was concerned about privacy issues. Mr. Crocker stated that if the ballot was cast other than first-class mail, then potentially privacy could be an issue, since the Board's staff would have to print it, check it for signature and ID number, and put it in the ballot box.

Chairman Sapp was concerned with the low volume of employees voting. Chairman Sapp stated that although he would like to save costs, he would rather see more participation from the employees. The process is outdated with all the technology that is available. Mr. Hutcheson wondered if it could be put on the website. Mr. Blevins stated that he is uneasy about the use of an automated system because the internet is vulnerable to hacking. Mr. Sipek stated that some important changes to the statute have already been implemented. For example, paper ballots were mailed to the employees and returned to a third party using a post office box. With the amendment, which the Legislature approved, paper ballots are mailed to the employees, but they can be returned to the Personnel Board via first-class mail, facsimile, scanned e-mail or hand-delivered. Mr. Sipek stated if an employee received the ballot electronically in their in-box, they were more likely to vote. These votes would still need to be viewed by a third party and counted.

Mr. Crocker stated that there might be a few employees who may not get the blast e-mail, but a message could be placed on the Personnel Cabinet's or Board's website that an employee can ask for a ballot, if they do not receive one.

Chairman Sapp suggested to Mr. Sipek and Mr. Crocker to talk to the Chairman of the House State Government Committee and the Senate State Government Committee about the lack of response and whether they could find ways to increase participation. If it is an important issue, the Board may get a bill sponsored. Mr. Crocker said Senator Joe Bowen and Representative Brent Yonts would be the ones to discuss this matter with. Chairman Sapp stated that Mr. Crocker and Mr. Sipek should make an appointment to talk with them at the next interim committee meeting.

In another matter, Mr. Blevins stated he would like the staff to calculate the amount of money per year when the Board approves to make an Appellant whole. Mr. Sipek stated that the staff could use Back Pay Vouchers to calculate this. Mr. Blevins was concerned about the cost of Hearing Officers versus the cost of back pay. Chairman Sapp stated that is valid because the Board cut Hearing Officers this year, which lengthened the time for back pay.

There being no further business, Mr. Hutcheson moved to adjourn. Ms. Herndon seconded and the motion carried 6-0. (12:05 p.m.)

Wayne D. Sapp, Chairman

David B. Stevens, Member

David F. Hutcheson, Jr., Member

Tommy W. Chandler, Member

Donald W. Blevins, Member

Ramona Herndon, Member